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Sentence

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

10 Cr. 162 KMW

5 WESAM EL-HANAFI,

6 Defendant.

7 -----x

8  
9 January 20, 2015  
10 New York, New York

11  
12 Before:

13 HON. KIMBA M. WOOD,

14 District Judge

15  
16 APPEARANCES

17  
18 PREET BHARARA,  
19 United States Attorney for the  
20 Southern District of New York  
21 JOHN P. CRONAN,  
22 MICHAEL D. LOCKARD,  
23 Assistant United States Attorneys

24 LAW OFFICE OF SARAH KUNSTLER,  
25 Attorneys for defendant El-Hanafi  
BY: SARAH KUNSTLER, Esq.  
REBECCA HEINEGG, Esq.  
Of counsel

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1 (In open court)

2 (Case called)

3 THE COURT: Good morning. Please have a seat. Good  
4 morning, Mr. El-Hanafi. We are here for the sentencing of Mr.  
5 El-Hanafi. I'd like to begin by asking Ms. Kuntsler, have you  
6 and Mr. El-Hanafi had an adequate opportunity to review the  
7 presentence report?

8 MS. KUNSTLER: Yes, your Honor.

9 THE COURT: Are the corrections you wished to have  
10 made to it the same as in your June 17th, 2013 letter to me?

11 MS. KUNSTLER: Yes, your Honor.

12 THE COURT: In Paragraph 12, you object to the amounts  
13 sent per week by Mr. El-Hanafi and Mr. Hasanoff to Al-Qaeda.  
14 It seems to me it might be more appropriate to simply state the  
15 total that the two of them sent.

16 MS. KUNSTLER: That is acceptable to us, your Honor.

17 THE COURT: Is the total 70,000 or less than that?

18 MR. CRONAN: Your Honor, I believe the total  
19 forfeiture was 70,000 because the total was 67,000 and then  
20 approximately \$3,000 in other equipment such as computer  
21 equipment.

22 THE COURT: All right. So Paragraph 12 will now read:

23 "Starting in around 2007, El-Hanafi and Hasanoff sent  
24 a total of approximately \$67,000 to a senior Al-Qaeda operative  
25 in Yemen."

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1 MR. CRONAN: No objection to that from the government,  
2 your Honor.

3 MS. KUNSTLER: No objection, your Honor.

4 THE COURT: All right. With respect to Paragraph 27,  
5 you have a number of objections. I propose the following:

6 "Wesam El-Hanafi also received various assignments  
7 from CC-4 which he was instructed to relay to Hesanoff and  
8 CC-1. El-Hanafi was directed to research specific types of  
9 military jackets, military boots, military pants, video  
10 camcorders and remote control cars."

11 I would add this: "The video cameras were to be used  
12 by Al-Qaeda to record tactical operations against U.S. and  
13 coalition forces to then use on the internet as propaganda."

14 With respect to the remote cars, "El-Hanafi was  
15 directed to research cars with specific frequencies of radio  
16 signals. Al-Qaeda desired these remote control cars because  
17 they could be modified into components for explosives. After  
18 researching these items, El-Hanafi directed Hasanoff to  
19 purchase and ship such a remote control device to Al-Qaeda in  
20 Yemen, which Hasanoff did."

21 MS. KUNSTLER: One moment. Ms. Heinegg is handling  
22 the objections. She has a question for Mr. El-Hanafi.

23 THE COURT: Okay.

24 (Discussion off the record)

25 MS. HEINEGG: Your Honor, as to Paragraph 27, rather

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1 than adopt that modification, we would prefer to withdraw that  
2 objection and leave it as it is.

3 THE COURT: What is the government's view?

4 MR. CRONAN: Your Honor, we don't think either  
5 formulation is accurate based on the facts.

6 THE COURT: All right. I will leave Paragraph 27 as  
7 it was originally written.

8 With respect to Paragraph 22, I propose to take out  
9 the last two sentences.

10 MS. KUNSTLER: Paragraph 22, your Honor?

11 THE COURT: 32.

12 (Discussion off the record)

13 MS. HEINEGG: That is acceptable to us, your Honor.

14 MR. CRONAN: Your Honor, so I understand, the entire  
15 paragraph?

16 THE COURT: No. The first sentence remains, which  
17 would state:

18 "In addition to recruiting CC-1 for Al-Qaeda, Wesam  
19 El-Hanafi performed tasks for Al-Qaeda in New York City in May  
20 2008."

21 MR. CRONAN: That is acceptable, your Honor. Thank  
22 you.

23 THE COURT: According to the Bureau of Prisons, Mr.  
24 El-Hanafi's doctor's recommendations for future treatment and  
25 placement will receive the most credence if a paragraph is

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1 placed in the PSR. So I would urge defense counsel to draft  
2 and run by the government something consistent with the most  
3 recent treating doctor, most recent expert's recommendations.

4 MS. KUNSTLER: Your Honor, we'll do so. We submitted  
5 a letter, dated January 16th, from Dr. Weitz, and that will be  
6 the basis on which --

7 THE COURT: Right. I considered attaching that, but I  
8 think it carries more force if it is a paragraph in the PSR.  
9 It could be a long paragraph.

10 MS. KUNSTLER: Okay.

11 THE COURT: I have read all the sentencing submissions  
12 including a letter --

13 MR. CRONAN: I apologize, your Honor. Before we're  
14 done with the PSR, there is one change the government was going  
15 to request. It was not in the draft, the original draft, so we  
16 apologize for not raising it earlier. It is a bit unusual, but  
17 in the recommendation section at the very end, and specifically  
18 Page 23, it may just be a matter of rephrasing the third  
19 paragraph, but in light of the pending civil litigation  
20 regarding the medical care, I think it is important to note  
21 that to the extent the PSR reports the cause of Mr. El-Hanafi's  
22 medical condition, it either not represent what caused it or  
23 make clear it is according to Mr. El-Hanafi, and the Bureau of  
24 Prisons disputes it.

25 Earlier in the PSR it makes clear Mr. El-Hanafi claims

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1 the DVT was caused by his transport. Here it was phrased more  
2 categorically it was, in fact, caused by the transport.

3 THE COURT: What are your specific proposals?

4 Looking at the third full paragraph, do you want to  
5 stop at the word, "foot"?

6 MS. HEINEGG: Your Honor, we would be fine with  
7 amending it to read or begin, "According to Mr. El-Hanafi."

8 MR. CRONAN: Your Honor, I think that's right. If we  
9 start each of the sentences with "According to Mr. El-Hanafi,"  
10 it would address any concerns that we have.

11 THE COURT: Okay. That is only in the third full  
12 paragraph on Page 23?

13 MR. CRONAN: That's right. It would start with,  
14 "according to Mr. El-Hanafi, Mr. El-Hanafi has suffered  
15 permanent damage," and the sentence would continue.

16 THE COURT: Yes.

17 MR. CRONAN: Just to be perfectly clear, I would  
18 suggest that each of the sentences in that paragraph also  
19 starting --

20 THE COURT: Also, "according to Mr. El-Hanafi," I'll  
21 make those changes. All right.

22 I have read all of the sentencing submissions  
23 including a letter from Mr. El-Hanafi and the many letters from  
24 Mr. El-Hanafi's family, attesting to his proactive kindness  
25 toward all of them, and I learned during the course of the

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1 one-day hearing the extent to which Mr. El-Hanafi suffers from  
2 a debilitating illness.

3 I would be glad to hear first from Ms. Kunstler, then  
4 defendant and then the government.

5 MS. KUNSTLER: Thank you, your Honor. Would you mind  
6 if I stood at the podium?

7 THE COURT: Not at all.

8 MS. KUNSTLER: Thank you.

9 Your Honor, all of us, the Court, the government and  
10 defense counsel, have spent a long time on Mr. El-Hanafi's  
11 medical condition.

12 I want to start out by thanking the court for giving  
13 us this time, time for me to return from maternity leave and  
14 assume responsibility for the case, time for Ms. Heinegg and I  
15 to find Dr. Weitz, to review the materials in this case, time  
16 for Dr. Weitz to review them and time for that very long  
17 hearing that we had last week or week before. It is blurring  
18 together for me now.

19 As a result of this, we all better understand Mr.  
20 El-Hanafi's, medical care Mr. El-Hanafi has received, his  
21 medical needs going forward and the extent of his disability.  
22 Last week's hearing was informative. I don't want to dwell on  
23 it partly because I'm still exhausted from it myself. I think  
24 it is clear, as it was clear from the reports that the doctor  
25 submitted, that our experts have very different perspectives.

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1 Their perspectives differ on how Mr. El-Hanafi's DVT began, the  
2 quality of medical care he has received within the Bureau of  
3 Prisons, and how that care impacted his ongoing disease and  
4 disability. What I would like to highlight from that hearing  
5 is this:

6 Our experts come to their conclusions from vastly  
7 different sets of experiences. Dr. Weitz, as the court knows,  
8 has authored over 200 peer-reviewed articles on DVT. He has  
9 participated in numerous clinical trials. He has been treating  
10 patients with DVT for more than 30 years. His opinions are  
11 based on his experiences as a practitioner and researcher, but  
12 they're also based on the peer-reviewed research of others in  
13 the field which is used to support his conclusions.

14 In contrast, Dr. McKinsey has not participated in  
15 clinical studies on DVT, has not published peer-reviewed  
16 articles on thrombosis, and his conclusions on the natural or  
17 what he refers to as the natural progression of DVT is not  
18 something that is documented in the medical literature, but  
19 rather, according to his testimony, something that was based on  
20 his experience and the experience of others who practice with,  
21 more of a general knowledge.

22 This experience, the experience in which he bases his  
23 conclusions is far more limited than Dr. Weitz. Dr. McKinsey  
24 estimated I think he has treated 500 to 600 patients in his  
25 career. That is about or less than what Dr. Weitz treats in



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1 the course of a single year. He treats about, as he testified,  
2 20 patients a week.

3 Unlike Dr. Weitz, Dr. McKinsey doesn't see the gamut  
4 of patients with this condition. He testified that the  
5 patients he sees are the most severe, and that is his frame of  
6 reference. He doesn't often see patients that were presenting,  
7 as it is our contention Mr. El-Hanafi was presenting, patients  
8 in the early stage of a development, of developing DVT.

9 Further, Dr. McKinsey's conclusions that Mr.  
10 El-Hanafi's DVT didn't begin earlier are based on a very narrow  
11 reading of the BOP records, records that he interprets as  
12 indicating isolated pain or swelling that he deemed  
13 inconsistent with a DVT.

14 His conclusions are based on assumptions on how  
15 drop-down methods are used to populate fields on medical  
16 records and the meaning and comments. His interpretation  
17 strains credulity, not to mention the fact that the records he  
18 was interpreting are records that the BOP at the very time was  
19 creating them, was using to support continued inaction.

20 Given that the BOP wasn't planning on doing anything  
21 and in fact didn't do anything in over a year of complaints,  
22 they had an interest in minimizing his symptoms in the reports  
23 they created after sick call verdicts where the decision was we  
24 do nothing or we continue the course of ibuprofen, compresses,  
25 elevate your leg.

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1           Mr. El-Hanafi's own description of his pain and  
2           symptoms which Dr. McKinsey testified that he reviewed but  
3           could not specifically remember and were not addressed in his  
4           timeline of symptomology and otherwise cited in his reports are  
5           striking. They are the desperate pleas of a person who is  
6           experiencing their symptoms worsen and seeing his complaints  
7           ignored, at 17 or 18 months he spent in pain with anxiety as  
8           part of his conditions of confinement, part of what makes his  
9           conditions of confinement qualitatively different from that of  
10          the average inmate of the MCC.

11           So, finally after 15 months of symptoms and  
12          complaints, an ultrasound was ordered, and two months passed  
13          until it was performed. Both experts agreed, they do agree  
14          this is a long delay. Dr. McKinsey has a machine in his  
15          office. Patients in his office rarely wait longer than an  
16          hour. A delay of two months is really unthinkable outside of  
17          the prison context or possibly perhaps outside of the third  
18          world.

19           Even if Mr. El-Hanafi's DVT started at the time of the  
20          ultrasound or the time the ultrasound is ordered, rather, Dr.  
21          Weitz told us that even a delay of this long, a delay of two  
22          months can lead to disastrous consequences and permanent  
23          disability. This is the kind of delay, your Honor, that  
24          continues to happen. I have here, which I have already  
25          provided to the government, it is just a medical record that

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1 just indicates -- and I can provide it to the court -- it is  
2 not all that remarkable. It just indicates that on November  
3 19th, Mr. El-Hanafi got a referral for a nephrologist for the  
4 mild renal insufficiency that was testified to at the hearing.

5 That referral was made, and I apologize, I don't have  
6 it, your Honor, but in addition to this, they normally have a  
7 special referral sheet that says your condition has been  
8 reviewed and you have been, you know, you will be scheduled for  
9 a nephrology consult. A sheet like that was also issued in the  
10 same day as it was noted in the record. This is dated November  
11 19th, 2014.

12 As of today's date, two months later, almost exactly  
13 two months later, this nephrology consult has not happened. I  
14 spoke to the government before this hearing. They informed me  
15 it has been scheduled. That is something I have also been  
16 hearing from the BOP directly for weeks now as I e-mail them  
17 and say do you know what is going on with this?

18 It has been scheduled. I point this out because a  
19 delay of two months is not unusual. Also because at the time  
20 that referral was made, it was sheer luck it was made in the  
21 first place. Mr. El-Hanafi was taken to see a hematologist,  
22 one of many he gets to see by the luck of the draw when he is  
23 taken to the hospital. This one happens to be a particularly  
24 careful one who went through that day a series of records and  
25 look and saw renal labs that were at that point six months' old

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1 and said look at this, these numbers aren't right. Let's have  
2 you evaluated further.

3 I noted the BOP has provided a letter endorsing their  
4 own ability to provide excellent care. I do not doubt they  
5 have this ability in theory, but what matters here is not what  
6 they're theoretically able to do. What matters is what they  
7 actually do. What the medical history in this case provides is  
8 ample evidence of what they do in practice, they routinely  
9 disregard symptoms and delay care or deny it altogether.

10 Your Honor, this is not my first experience of the  
11 inadequacies of BOP medical care. My experience is not limited  
12 to pretrial facilities such as MCC or MDC, either. I have had  
13 clients who received extremely delayed cancer diagnoses while  
14 in their designated facilities and despite complaints, one of  
15 whom died there after a delayed diagnosis.

16 I had another client in a case before your Honor where  
17 the client had extremely serious medical conditions,  
18 surrendered on a Friday and unfortunately died over the  
19 weekend, his first weekend in jail, first weekend at his  
20 designated facility which was a medical facility.

21 Dr. Weitz told the court that it is more likely than  
22 not that Mr. El-Hanafi's condition is worse because of the  
23 delays in diagnosis in this case. Your Honor pressed him to be  
24 specific, and that is as specific as he can get, more likely  
25 than not. Mr. El-Hanafi has now a severe post-thrombosis

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1 condition, continued pain, decreased mobility and he will have  
2 this condition for the rest of his life.

3 Mr. El-Hanafi is a young man, too young to be this  
4 disabled. This course of events, the medical care Mr.  
5 El-Hanafi's received, the disability and continuing medical  
6 needs he now has and likely he will need, there is a  
7 demonstrated prior performance that will inadequately provide  
8 for those needs going forward, is for this Court's  
9 consideration under 3553 (a).

10 As for the abominable living conditions at the MCC for  
11 last five years, those conditions are not unique to Mr.  
12 El-Hanafi. Those conditions, unfortunately, are endured by a  
13 large number of detainees who live there. Your Honor has a  
14 letter from Mr. El-Hanafi's bunk mate, who is another person I  
15 have spoken to about the conditions specifically on that unit,  
16 who happens to be here in court as well to support him, and it  
17 is something that I speak to a great many of my clients about  
18 prior to sentence, where I ask them what the specific  
19 conditions are, how the rodent problem and insect problem is,  
20 and these are complaints I normally hear. I do believe it is a  
21 little worse in the dorms than it is in the cells where  
22 Mr. El-Hanafi is, that the rodent and insect problem is worse  
23 there because of the group living that is the nature of a  
24 dormitory.

25 The government has long called Mr. El-Hanafi's medical

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1 issues a red herring and a distraction, and I just want to say  
2 again, I am done talking about the medical stuff, but I want to  
3 say again that we recognize that the crime to which Mr.  
4 El-Hanafi has pled guilty is incredibly serious, and I hope the  
5 court knows that, and I also hope the court knows that we have  
6 no intention of distracting from it or minimizing it or  
7 minimizing Mr. El-Hanafi's culpability. As we have stated many  
8 times in our prior submissions, nothing we have presented to  
9 the court is intended to do that.

10 Mr. El-Hanafi accepts absolute responsibility for his  
11 actions and he understands he must pay for his criminal conduct  
12 with a significant term of imprisonment. Mr. El-Hanafi's  
13 medical issues are important, but more important and more  
14 striking to me is the change Mr. El-Hanafi's undergone since  
15 his arrest in this case.

16 I met Mr. El-Hanafi, Ms. Heinegg met Mr. El-Hanafi  
17 over three years ago, and at that point he had been in custody  
18 for a year and a half. I didn't spend so much time in the  
19 beginning as Ms. Heinegg, but I have spent significant time  
20 with him recently over the course of preparing for the medical  
21 hearing, over the course of preparing for sentencing, and he is  
22 a man who is a pleasure to sit down with and speak with. He is  
23 a man who always shows concern for me and asks about how I'm  
24 doing.

25 He is a man who expresses on a regular basis to me his

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1 sincere remorse for his actions. He is a man, I watch him come  
2 into the visiting room and I watched how he treats the guards  
3 who staff the visiting room, and I watch how they treat him.  
4 This is something that I experience on a regular basis with a  
5 lot of clients, and I can see I have clients who make eye  
6 contact. I have clients who ask the guards how they're doing.  
7 I have clients -- and he is one of those people. He is one of  
8 those people.

9 Then I have clients on the other end of the spectrum  
10 who acknowledge nothing and no one, sometimes not even me. He  
11 is one of those people who is aware of other people, who cares  
12 about how other people are doing, and the people around him  
13 notice that. They notice that and they respond to him. When I  
14 hand them a paper that says I am seeing El-Hanafi, I can't  
15 even -- it is not something tangible. It is something, almost  
16 like there is a little bit of a relaxed vibe that hits the air  
17 because this is a person who is not going to give anyone any  
18 trouble and this is a person who is going to be a human being,  
19 who is going to treat them like he cares.

20 Mr. El-Hanafi knows that he'll never be able to change  
21 the past, he will never be able to undo what he has done, but  
22 he is a person who must live with the horror of what he has  
23 done, but that is not going to go away for him, not going to  
24 go away for his family. It is just not going to go away, but  
25 he is a person who has a stated commitment, but also how he

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1 actually behaves in the world, who is living a commitment to be  
2 different.

3 Your Honor, I respectfully ask that this Court impose  
4 a non-guideline sentence in this case that takes all of this  
5 into account. I am not going to request a specific sentence  
6 here, although I do note that sentences for defendants  
7 convicted of providing material support for terrorism without  
8 more tend to fall in the 90 to 180-month range, and that the  
9 most severe sentences of 20 years and more have in the vast  
10 majority of cases been imposed only on defendants with explicit  
11 and concrete plans to commit murder or terrorist acts involving  
12 mass fatalities.

13 Those, too, are defendants without Mr. El-Hanafi's  
14 medical issues and include defendants who went to trial, and  
15 for those more similarly situated to Mr. El-Hanafi, those whose  
16 sentences -- they pled guilty and accepted responsibility for  
17 their conduct, for their actions as Mr. El-Hanafi has, I have  
18 not met those defendants and I can't speak to the sincerity of  
19 their remorse or sincere personal transformations they may have  
20 undergone or the kind of people they are, but I can tell you  
21 this:

22 In over nine years of practice, I have never met a  
23 client as transformed as Mr. El-Hanafi. With every breath he  
24 takes, the furthers his commitment to live a moral and  
25 law-abiding life, being mindful of and working to improve the



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1 lives of his friends, his family and his fellow citizens.

2 Thank you.

3 THE COURT: Mr. El-Hanafi, I have read your letter.  
4 There is no requirement for you to speak, but if you would like  
5 to speak, I would be glad to hear you now.

6 THE DEFENDANT: I would like to apologize for my  
7 actions. I apologize to the court, the government and to my  
8 family and to the community. I regret my actions. I am  
9 embarrassed by what I did. I caused too much pain and  
10 suffering for people.

11 Although I cannot change the past, I am dedicated to  
12 living every day being the person I should be, a person  
13 dedicated to living a moral and law-abiding life, rededicated  
14 to my family. That is who I was before I got involved with  
15 this terrible ideology and that is a part of the actions I am  
16 ashamed of. I have had a lot of time to reflect on my actions  
17 and consequences. I didn't just make the wrong choices. I  
18 made the worst choices. I take full responsibility. I have  
19 learned my lesson. I will not go down this path again.

20 Because of my arrest in this case, I am fortunate to  
21 have the opportunity to change the path I was on and to meet  
22 and be inspired with very outstanding individuals, the lawyers  
23 in my case, Ms. Fink, Heinegg and Kunstler. They helped me  
24 understand I am better than the worst actions that I have done  
25 and I can choose to live the rest of my life being that better

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1 person. That is what I choose.

2 I want to thank you, your Honor, for the help you gave  
3 me for my medical attention while I was at MCC in the past four  
4 years and thank you for giving me the opportunity to talk.

5 Thank you.

6 THE COURT: Would the government like to be heard?

7 MR. CRONAN: Thank your Honor. Might I use the podium  
8 as well?

9 THE COURT: Yes, certainly.

10 MR. CRONAN: Your Honor, for the past year and a half  
11 the focus of this case obviously has been largely on Mr.  
12 El-Hanafi's medical condition. I think the first medical  
13 report we got was in July of 2013 from a Dr. Laura Chalfin, and  
14 since then we obviously had a lengthy hearing last week or the  
15 week before.

16 There have been over a half dozen other medical  
17 reports. All of that was appropriate under Section 3553 (a).  
18 It was completely proper for the court to consider the medical  
19 condition of the defendant and the ability of the BOP to treat  
20 him going forward.

21 But, your Honor, those medical issues have become such  
22 a focus in this case over merely two years, and the defendant's  
23 arrest now almost five years ago makes it easy to lose sight  
24 about what this case is about. It is easy to lose sight about  
25 the unspeakable seriousness of the conduct of this man when he

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1 decided to support Al-Qaeda. It is easy to forget the  
2 overwhelming demand for deterrence in cases involving  
3 terrorism. Those are far and away the most important  
4 considerations for this Court when determining the appropriate  
5 sentence.

6 Your Honor, this is a man who was born in Brooklyn,  
7 benefited from every opportunity our country has to offer, a  
8 great education. He secured an excellent job. He continues to  
9 have a very loving family. He was living the American dream.  
10 Then he turned his back on America and aligned himself with our  
11 country's greatest enemy.

12 He traveled from Dubai to Yemen, where he pledged an  
13 oath of allegiance to Al-Qaeda, and this was no meaningless  
14 pledge. For this defendant, his actions spoke louder than his  
15 words. Over the course of nearly three years the defendant and  
16 this co-conspirators worked tirelessly to support Al-Qaeda.  
17 They provided extensive financial support. They supplied  
18 tangible items, items that Al-Qaeda required like computer  
19 equipment, GPS devices, cold weather gear, remote control  
20 devices. They lobbied over and over again to find a path to  
21 travel to fight and possibly die in jihad. They wanted to  
22 fight with the mujahideen, the mujahideen who were fighting  
23 America. It was that conduct which should drive the sentence  
24 and it is that conduct that calls for a sentence of 20 years  
25 imprisonment.

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1           Your Honor, since the medical issues have been such a  
2 focus of this case, I want to spend some time at first talking  
3 about the defendant's medical condition and how from the  
4 government's perspective they should come into play at  
5 sentencing. What should the court consider and what should the  
6 court not consider?

7           The government submits that the court should consider  
8 the defendant's current condition, his prognosis going forward  
9 and the BOP's ability to provide adequate care during his  
10 incarceration. The question looking back of whether the Bureau  
11 of Prisons has in the past provided optimal care should not be  
12 addressed by this Court for a number of reasons:

13           First, that issue, the quality of medical care, should  
14 not impact what the appropriate sentence is. The question of  
15 whether or not Mr. El-Hanafi received appropriate care in the  
16 past doesn't go to his history or characteristics. It doesn't  
17 go to the seriousness of the offense. It doesn't go for  
18 deterrence or need to promote respect for the law. The only  
19 way it could come into play is under the guidelines analysis.

20           There is support that conditions of confinement can be  
21 a basis for a downward departure. In this case, under the plea  
22 agreement, the parties are not authorized to seek a downward  
23 departure or even to suggest that the court consider that.

24           The second, even if there were a downward departure  
25 available, and even granting the most favorable interpretation

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1 of the evidence presented by the defendant, the conditions were  
2 not egregious enough to downwardly depart. I am aware of one  
3 case where the medical care received by a defendant was  
4 considered by the court in granting a downward departure. That  
5 case is Mateo, and in Mateo, as I am sure the court is aware  
6 from the briefing, a pregnant defendant went into labor while  
7 in pretrial detention, didn't receive medical assistance for  
8 over 15 hours, and gave birth at the detention center rather  
9 than in a medical facility.

10 In that case, the government stipulated that there was  
11 not appropriate medical care, and the court at sentencing  
12 determined the trauma from that experience as well as the  
13 defendant being a victim of sexual abuse by prison guards  
14 warranted a downward departure.

15 The facts in this case, even most favorably viewing  
16 them to the defendant, just simply aren't even in the same  
17 universe as what was before the court in Mateo. Again Mateo  
18 was a downward departure issue which is not available here. We  
19 are not aware of any cases in which a court has reduced a  
20 sentence under Section 3553 (a) under any other basis than  
21 downward departure.

22 There is another reason this Court should not reach  
23 the issue of standard of BOP care previously. As I am sure the  
24 court is aware, the defendant has a pending civil suit in this  
25 courthouse against the United States. That suit is pending

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1 before Judge Gregory Woods, and that suit is the appropriate  
2 venue if there was substandard care for the defendant to seek  
3 any redress he is entitled to.

4 He is pursuing that, and that is the appropriate  
5 forum. I am sure in that case the government would argue that  
6 a finding at a separate factual hearing in a criminal case in  
7 which the BOP was not represented can't be used to estop  
8 arguments in a civil case. I think it is very important the  
9 court avoid any sort of ruling in this context that can be used  
10 against the Bureau of Prisons in a separate civil suit.

11 THE COURT: I agree with you.

12 MR. CRONAN: Your Honor, what should the court  
13 consider?

14 First, the defendant's current medical condition and  
15 his prognosis; and

16 Second, the appropriate treatment and the BOP's  
17 ability to administer that.

18 We all agree that the defendant has deep vein  
19 thrombosis and that that condition has reoccurred, and  
20 depending on various considerations, it may occur again in the  
21 future. I think the parties all agree he has a genetic  
22 predisposition to developing blood clots that at least makes  
23 him somewhat more likely than the general population to have  
24 deep vein thrombosis.

25 There is disagreement as to the seriousness of the

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1 condition and how it will affect his future life. Dr. McKinsey  
2 opined basically that on the spectrum of patients he has seen,  
3 while the defendant does have deep vein thrombosis, he is on  
4 the less serious end of the spectrum and believes if the  
5 defendant follows appropriate treatment, most notably  
6 anti-coagulation therapy, compression stockings, leg elevation,  
7 he can lead a normal life.

8 Your Honor, I want to take a moment to defend Dr.  
9 McKinsey. Dr. McKinsey is extremely well qualified. He is a  
10 vice chairman of surgery at Mt. Sinai. He is a systems chief  
11 for aortic intervention for the entire Mt. Sinai system. He  
12 has a clinical practitioner treating DVT.

13 Doctors disagree, but Dr. McKinsey is someone who knew  
14 what he was talking about. Dr. Weitz painted a much grimmer  
15 picture, and I know your Honor appreciates this, but it was  
16 also a picture that largely was based on the defendant's  
17 reporting of his own pain or discomfort.

18 To state the obvious, an individual in that situation  
19 had an incentive to exaggerate. I understand the court  
20 appreciates that. We don't know about the level of pain and  
21 discomfort he is under, but we don't need to know because both  
22 doctors are largely in agreement as to appropriate treatment  
23 going forward.

24 The submissions made by the Bureau of Prisons,  
25 especially the one made last Friday, made clear the BOP can

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1 administer the treatment that is recommended. First, I know  
2 the court knows the defendant has been designated as care Level  
3 4 inmate by the Bureau of Prisons. At that care level, the  
4 defendant will be designated to one of six Bureau of Prisons  
5 medical referral centers.

6 The BOP letters talked about the care level at those  
7 centers, but in short, they provide inpatient care to seriously  
8 ill inmates and a variety of medical services. We are talking  
9 more specifically about the care that this defendant needs.  
10 The BOP's letter makes clear that the BOP can administer the  
11 specific care that both doctors have recommended.

12 The doctor recommended anti-coagulation medication.  
13 That is currently happening at the MCC. The Bureau of Prisons  
14 has implemented a protocol which we provided to the court for  
15 the administration of anti-coagulation medication. The BOP  
16 provides compression stockings when medically indicated, and  
17 the BOP also regularly revisits that to determine whether or  
18 not the stockings continue to be required.

19 Ultrasounds can be conducted on site or at a local  
20 facility. All BOP facilities provide inmates with the  
21 opportunity to exercise. The BOP facilities provide materials  
22 to help an inmate elevate his or her leg if it is medically  
23 indicated. When the BOP transports an inmate, it can assure  
24 transportation without immobilization for more than four hours.

25 There was testimony at the hearing a couple of weeks



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1 ago about the defendant's high blood pressure and possible  
2 renal issues. The BOP monitors hypertension and provides  
3 appropriate medication to control hypertension. Some BOP  
4 institutions, especially medical referral centers, have a  
5 nephrologist on site, and if not, there is consultation and  
6 treatment provided at local facilities.

7 All BOP facilities have procedures in place to provide  
8 emergency care for inmates. In fact, as I think your Honor is  
9 well aware, the BOP medical referral centers are located close  
10 to some of the country's finest doctors and hospitals. That is  
11 a long way of saying the BOP can handle the treatment that this  
12 defendant needs.

13 What should drive the sentence in this case?

14 Again, most importantly is the nature of the offense.  
15 Your Honor, providing support to Al-Qaeda without question  
16 stands at the apex of the most serious offenses anyone, let  
17 alone a U.S. citizen can commit against the United States. The  
18 defendant chose to support a group that is publicly declared  
19 war against the United States and a group that has followed  
20 through with that declaration.

21 His involvement with the group's extreme ideology  
22 dated back to 2003 when he was living in Brooklyn. After that  
23 initial radicalization, he traveled to the United Arab  
24 Emirates, where he made contact with a facilitator, someone who  
25 as your Honor is aware, was since been killed fighting in

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1 Syria. Through that facilitator, the defendant made contact  
2 with more senior terrorist operatives in Yemen and began  
3 providing financial and other support to those people.

4 He was fully intending that support was going to  
5 Al-Qaeda. The defendant was all-in with Al-Qaeda, and he  
6 showed that over a course of years. In February 2008 when he  
7 traveled all the way to Yemen, he arrived in Yemen, was picked  
8 up from a predetermined location, a hood was placed over his  
9 head and he was driven to another location where he spent two  
10 or three days staying with a senior terrorist operative who  
11 went by the name The Doctor.

12 The defendant made this trip to Yemen so he could be  
13 face-to-face with senior members of Al-Qaeda and demonstrate  
14 his unwavering support to Al-Qaeda, and he succeeded. I don't  
15 say this to make light of Ms. Kunstler's presentation, but I am  
16 sure Mr. El-Hanafi was very polite and pleasant when he met  
17 with those terrorists out there. So that is part of his  
18 appeal, he is a likable person. That is what drew them to him,  
19 someone who was from the United States, who would be able to  
20 travel to the United States seamlessly without detection and  
21 insert himself into the American culture.

22 In Yemen he pledged that oath of allegiance to  
23 Al-Qaeda and The Doctor. He delivered a commuter to The  
24 Doctor. El-Hanafi delivered \$12,000 in cash to The Doctor and  
25 received assignments from those terrorist contacts that he

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1 conveyed to Hasanoff.

2 In Dubai he received, the defendant himself received  
3 an oath of allegiance from Hasanoff, and he traveled to New  
4 York City where he met with another one of his co-conspirators,  
5 the person identified as the cooperating witness in the  
6 defendant's submission, to encourage that person to also join  
7 Al-Qaeda.

8 Even before that February 1998 trip to Yemen, the  
9 defendant was making regular financial contributions to  
10 Al-Qaeda. Money, even small sums of money can support  
11 terrorism in so many ways. It can buy guns, explosive devices,  
12 help terrorist operatives travel. It can help prepare  
13 propaganda videos on the internet. As we talked about earlier,  
14 in total the defendant and his co-conspirators made \$67,000 in  
15 donations to Al-Qaeda. What else?

16 The defendant and Sibirhan Hasanoff obtained items  
17 sought by their terrorist contacts. He researched remote  
18 control devices, and Hasanoff later sent the remote control  
19 devices to The Doctor. The defendant and Hasanoff knew why  
20 their terrorist contacts wanted these remote control devices;  
21 so the item can be modified to be detonated at a distance, an  
22 explosive that the defendants knew full well Al-Qaeda would  
23 want to use against Americans.

24 The defendant worked to ingratiate himself with his  
25 terrorist contacts in hopes of becoming mujahideen, to travel

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1 and receive military-style traveling and fight in armed combat.  
2 On top of all of this, the defendant received an assignment  
3 from terrorist contacts to arrange for surveillance of  
4 locations in the United States, including the New York City  
5 Stock Exchange.

6 El-Hanafi directed Hasanoff to conduct that  
7 surveillance during Hasanoff's November 8, 2008 trip to New  
8 York and knew full well the only reason the terrorist  
9 operatives in Yemen would have wanted that information was for  
10 planning a future terrorist operation.

11 Your Honor, to be perfectly clear, the report Hasanoff  
12 prepared was very basic, it was very rudimentary. There was no  
13 advance plot against the stock exchange, and the report that  
14 Hasanoff actually drafted that the defendant sent along to the  
15 contact in Yemen was of no use to them whatsoever.

16 What matters is El-Hanafi was willing to assign  
17 Hasanoff to conduct that surveillance. He was asked by  
18 terrorists who he understood were with Al-Qaeda to arrange for  
19 surveillance of a densely populated area of Manhattan, and he  
20 did that. He did that to establish bona fides with Al-Qaeda,  
21 and he did that because he was all-in with Al-Qaeda, and he  
22 wanted Al-Qaeda to know.

23 Your Honor, let me briefly talk about deterrence.  
24 Terrorism is a crime that demands maximum deterrence. As your  
25 Honor noted when Hasanoff was sentenced, perhaps the most

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1 important factor in this sentencing is general deterrence. A  
2 message must be sent that if you support terrorism, whether  
3 you're supporting Al-Qaeda like Gaddafi did, or some other  
4 terrorist group or terrorist cause, you will be caught, you  
5 will be prosecuted and you will face a long sentence. It is  
6 hard to envision many crimes that carry a stronger demand for  
7 deterrence. Any level for support for terrorism requires  
8 criminal deterrence. A terrorist doesn't need huge sums of  
9 money to achieve its causes.

10 With respect to individual live deterrence and  
11 protecting the public from future crimes in particular  
12 committed by this particular defendant, it is good to hear Mr.  
13 El-Hanafi's comments. The court needs to keep in mind his  
14 ability to provide support to Al-Qaeda was not predicated on  
15 his youth or physical ability. He wanted to fight with  
16 Al-Qaeda, but the support he, in fact, provided was financial  
17 in nature. He sent money, he sent items and provided technical  
18 training based on his sophistication in computers. He can  
19 still do that notwithstanding his medical condition.

20 The court also asked the parties to brief comparable  
21 sentences in terrorism cases. The briefing was pretty  
22 extensive, and I know the court has reviewed them and I won't  
23 go into detail, except I would disagree with the  
24 characterization that 90 to 180 months is a common sentence for  
25 this sort of conduct. I think the conduct that might be most

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1 comparable was Iyman Faris, in the Eastern District of  
2 Virginia, who received a 20-year sentence. Obviously, the most  
3 comparable sentence was the Hasanoff sentence before this Court  
4 who received 18 years' imprisonment.

5 Let me say a few things about that sentence.  
6 Hasanoff's conduct was extremely serious, as reflected by the  
7 sentence. The 18 years, as the court may recall that Hasanoff  
8 got, reflected what I believe the court indicated was more or  
9 less a two-year reduction based on his rehabilitation in  
10 prison. I believe there was a letter from the chaplain at the  
11 MCC at that sentencing.

12 I would submit this defendant played a more important  
13 role than Sibirhan Hasanoff in this scheme. This defendant,  
14 the one who traveled to Yemen, he is the one who had the  
15 face-to-face contacts with the Al-Qaeda operatives. He is the  
16 one who trained them in encryption. He received the  
17 assignments and he is the one who assigned Hasanoff to conduct  
18 surveillance at the stock exchange.

19 Lastly, your Honor, as the court did with respect to  
20 Hasanoff, the court should order forfeiture in this case, as  
21 agreed by the parties. There was a consent order of forfeiture  
22 signed previously, and a forfeiture now should be \$70,000 joint  
23 and severally liable as it was for Hasanoff.

24 Your Honor, there is simply no aspect of this case  
25 that calls for any leniency or mercy in sentencing the

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1 defendant. A sentence of 20 years of imprisonment, as the  
2 guidelines recommend, is appropriate.

3 THE COURT: Thank you very much.

4 I need to begin with calculating the advisory  
5 sentencing guidelines. I adopt as correct the calculation  
6 agreed to by the parties in the plea agreement which results in  
7 a total offense level of 37. Although Mr. El-Hanafi has no  
8 criminal convictions other than the one for which he is being  
9 sentenced today, his criminal history is at the highest level,  
10 a Level 6, because he is subject to Section 3A1.4 (b) of the  
11 sentencing guidelines which mandates a criminal history of 6  
12 for any crime intended to promote terrorism.

13 This results in an advisory sentencing guideline level  
14 of 360 months to life. However, the maximum terms of  
15 imprisonment pursuant to statute in this case are 15 years for  
16 Count 1 and 5 years for Count 2, bringing the maximum possible  
17 sentence down to 20 years.

18 I turn now to the sentencing factors mandated by  
19 Section 3553, beginning with the seriousness of the offense.  
20 As I explained when sentencing Mr. El-Hanafi's co-defendant,  
21 Mr. Hasanoff, the criminal conduct in this case was extremely  
22 serious and demands a substantial sentence both to impose just  
23 punishment and to effect general deterrence. Mr. El-Hanafi  
24 swore an oath to Al-Qaeda, a terrorist organization, intent on  
25 harming the United States and its citizens and provided

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1 material and technical support to its operatives over the  
2 course of several years.

3 Mr. El-Hanafi provided tens of thousands of dollars to  
4 Al-Qaeda. He sought military training and he tried  
5 unsuccessfully to be sent to fight jihad. He was unsuccessful  
6 in trying to get to a battlefield in part because his senior  
7 Al-Qaeda contact wanted to use him and his American  
8 co-conspirators instead to destroy targets in the United  
9 States, something that Mr. El-Hanafi and his American  
10 co-conspirators were willing to do.

11 Among the material Mr. El-Hanafi provided to his  
12 Al-Qaeda contact were video camcorders that could be used by  
13 Al-Qaeda to record tactical operations against the U.S.  
14 military for use on the internet as propaganda, a remote  
15 control car with specific frequencies of radio systems which  
16 could be modified and used as components for explosives, a  
17 laptop computer, an Atlas translation device and encryption  
18 software, a hot spot BPN which creates a secure tunnel between  
19 a user and a secured server that encrypts and allows the user  
20 to mask the user's IP address.

21 He also provided technical guidance to his Al-Qaeda  
22 contacts and taught them how to use what he brought to them.  
23 He recruited another American to work for Al-Qaeda. In total,  
24 he and Mr. Hasanoff provided \$67,000 in cash to their Al-Qaeda  
25 contact.



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1           Although Mr. El-Hanafi and Mr. Hasanoff were directed  
2           to obtain information to assist in blowing up a large American  
3           dam and the New York Stock Exchange, Mr. El-Hanafi asked Mr.  
4           Hasanoff to obtain information about the New York Stock  
5           Exchange, but not the dam. Mr. Hasanoff's ensuing report was,  
6           as Mr. Cronan said, so rudimentary as to be useless to his  
7           Al-Qaeda contact. It may have been intended to be useless  
8           because at that time Mr. Hasanoff and Mr. El-Hanafi had begun  
9           to suspect that their Al-Qaeda contact had no intention of  
10          sending them to fight jihad.

11          The report on the New York Stock Exchange said only  
12          that the New York Stock Exchange was bordered by four streets.  
13          The streets were blocked off from vehicular traffic and someone  
14          would have to walk into the building.

15          Turning to Mr. El-Hanafi's history and  
16          characteristics, a number of factors stand out and counsel for  
17          a degree of leniency in the sentencing:

18          First, Mr. El-Hanafi's childhood was marked by abuse  
19          and poverty, but he nonetheless became a pillar of strength and  
20          supportive love to his relatives, 24 of whom wrote what appear  
21          to be heartfelt letters to the court, detailing his generosity  
22          toward them. Apart from his very serious offense in this case,  
23          his record is unblemished;

24          Second, the defendant has demonstrated some signs of  
25          remorse and rehabilitation during more than four years of

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1 presentencing incarceration. In a letter to the court, Mr.  
2 El-Hanafi has expressed regret for what he describes as his  
3 blind following of Al-Qaeda's ideology, which he now says he  
4 repudiates. He has also expressed appreciation for the  
5 privilege of being born and educated in America, a privilege he  
6 claims was recently thrown into relief by his relative's  
7 struggles for freedom in Egypt. Further, he appears to have  
8 been an exemplary inmate. His documented correspondence with  
9 prison staff concerning his deteriorating health concerns have  
10 been uniformly respectful, and he has committed no disciplinary  
11 infractions during this over four-year period in custody;

12 Third, during his incarceration, he has suffered  
13 considerably from a painful deep vein thrombosis and related  
14 post-thrombotic syndrome in a leg. That condition which  
15 developed sometime after his arrest caused him at times acute  
16 pain and substantially limited his mobility and his capacity  
17 for recreational activity during a prolonged period during his  
18 incarceration.

19 Although his symptoms are moderately well controlled,  
20 his prior pain and suffering was considerable in part because  
21 of delays in providing treatment after his diagnosis. As a  
22 result, the past four years of confinement have been  
23 significantly harsher for the defendant than they would have  
24 been for the average inmate. Because he has developed, in  
25 addition, Anti-phospholipid Syndrome, he is at high risk for

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1 further damage to his kidneys as well as a fatal pulmonary  
2 embolism. His risks will be heightened if he encounters  
3 violence in prison.

4 Absent evidence of the defendant's remorse,  
5 rehabilitation and physical suffering during confinement, I  
6 would sentence Mr. El-Hanafi to a term somewhat higher than his  
7 co-defendant Hasanoff's 18-year term, but in light of the  
8 unique factors that counsel for leniency in Mr. El-Hanafi's  
9 case, I find that a lower sentence is warranted.

10 Please stand for sentencing.

11 In order to effectuate general deterrence and taking  
12 into account all the factors I have mentioned, I sentence you  
13 on Count 1 to 15 years in prison, and on Count 2 to 5 years in  
14 prison, to run concurrently, for a total of 15 years in prison.

15 You will be on supervised release for three years,  
16 which can be shortened if you are permitted to join your family  
17 as you have contemplated in Egypt. I impose no fine. I impose  
18 forfeiture in the amount of \$70,000, which is payable jointly  
19 and severely with your co-defendants. I impose the special  
20 assessment of \$200.00, which is mandatory. You may sit while I  
21 read the conditions of supervision.

22 The standard and mandatory conditions of supervision  
23 will apply. The following special conditions will apply. You  
24 must submit your person, residence, place of business, vehicle  
25 or any other premises under your control to a search, if the

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1 probation officer has a reasonable belief that contraband or  
2 evidence of a violation of the conditions of release may be  
3 found. The search must be conducted at a reasonable time and  
4 in a reasonable manner. Failure to submit to a search may be  
5 grounds for revocation. You must inform any other residents  
6 that the premises may be subject to search pursuant to this  
7 condition. You must report to the nearest Probation Office  
8 within 72 hours of your release from custody. You will be  
9 supervised by your district of residence.

10 I take it the government moves to dismiss --

11 MR. CRONAN: Correct, your Honor.

12 THE COURT: -- the pending counts, and I do so now.

13 Is there anything further before I read the defendant  
14 his appeal rights? I note that I will grant the defense  
15 request that Mr. El-Hanafi be incarcerated in Fort Devens.

16 MS. KUNSTLER: Your Honor, I since have discussed that  
17 with Mr. El-Hanafi, and we would actual like the court to  
18 recommend FMC Butner, which is also a Level 4 medical facility  
19 over Devens.

20 THE COURT: Any objection?

21 MR. CRONAN: No, your Honor.

22 THE COURT: I will recommend FMC Butner.

23 MS. KUNSTLER: Thank your Honor.

24 THE COURT: Mr. El-Hanafi, I read every defendant his  
25 appeal rights, and I am reading you yours now.

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1           You can appeal your conviction if you believe that  
2           your guilty plea was somehow unlawful or involuntary or if  
3           there is some other fundamental defect in the proceedings that  
4           was not waived by your guilty plea.

5           You also have a statutory right to appeal your  
6           sentence under certain circumstances, particularly if you think  
7           the sentence is contrary to law. I am sure your lawyers will  
8           discuss this with you afterwards if they have not already done  
9           so.

10           With few exceptions, any notice of appeal must be  
11           filed within 14 days of judgment being entered in your case.  
12           Judgment is likely to be entered today or within the next few  
13           days. If you wish to appeal and you are not able to pay the  
14           cost of an appeal, you may apply for leave to appeal in forma  
15           pauperis. If you request, the Clerk of the Court will prepare  
16           and file a notice of appeal on your behalf.

17           I would like to thank counsel for their unstinting  
18           work in the case, very good work, and to wish Mr. El-Hanafi  
19           good luck. Thank you.

20           (Court adjourned)

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